

Supreme Court, U. S.
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IN THE

MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-388

TEX-LA ELECTRIC COOPERATIVE, INC., and
SAM RAYBURN DAM ELECTRIC COOPERATIVE, INC.,
Petitioners,

v.

CECIL D. ANDRUS, Individually, and as Secretary of the
Interior, ET AL., *Respondents.*

REPLY BRIEF FOR PETITIONERS

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December 27, 1978

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INTRODUCTION

Although captioned a "Reply Brief," this document does not present additional argument concerning the issues in the present case. It instead identifies certain misstatements of fact which appear in Respondent's brief in opposition. Petitioners had intended to identify these misstatements of fact in a letter to the Court, but were advised by the clerk's office that such a letter would not be distributed to the Court with the briefs. Petitioners were further advised that the only way to assure consideration by the Court of a communication concerning these misstatements of fact is to designate the communication a "reply brief." Accordingly, Petitioners submit herewith their reply

brief, in which they respectfully ask the Court's attention to the following:

I. RE ISSUES RAISED IN THE LOWER COURTS

At page 11 of their brief in opposition, Respondents make the following statement:

"Petitioners contend that the agency improperly included, as part of the operations charges to be recovered by the rate increase, expenses designed for recreation and wildlife activities associated with one of the two dam projects (Pet. 13). We agree with petitioners that Section 5 does not authorize the recovery of non-power costs from hydroelectric power customers. This specific objection was not, however, urged by petitioners in opposition to the entry of summary judgment in the district court or in the court of appeals, and it is thus not properly presented for review in this Court."

And again, at page 12 of their brief, Respondents say:

"Petitioners' failure to raise this specific claim in the courts below prevents the determination of this essentially factual issue on this record."

Contrary to Respondents' allegations, Petitioners raised the "specific objection" in every brief filed in the court of appeals and at oral argument. At page 46 of their initial brief, Petitioners said:

"The inclusion of recreation and fish and wildlife expenses in the operation and maintenance costs to be recovered by rates set under authority of 16 U.S.C. § 825s is unlawful, because that statute only allows recovery of 'the cost of producing and transmitting . . . electric energy.'"

At page 23 of their reply brief, Petitioners said:

"They [i.e., Petitioners] filed a motion to produce documents and two extensive sets of interrogatories (the answers to which . . . showed that the rates unlawfully recovered recreation and fish and wildlife costs)." (Footnote omitted.)

(The interrogatories referred to asked:

"What percentage of the operating and maintenance costs assigned to power is actually used for recreation and fish and wildlife at the Narrows Dam project?"

(The Corps of Engineers, which operates Narrows Dam, answered:

"On a cumulative basis from FY 65 to FY 73, 4.49% of Operating and Maintenance costs assigned to Power was actually used for Recreation and Fish and Wildlife on the Narrows Dam Project.")

At oral argument, Petitioners' counsel raised the specific objection on three separate occasions. Tr. Or. Arg. 10-11, 14-15, 45.

Finally, in their petition for rehearing, Petitioners said at pages 7-8:

"Appellants also submitted interrogatories to the Corps of Engineers, the answers to which revealed, *inter alia*, that the rate for Narrows Dam recovers non-power costs. Answer to Question No. 33 of Plaintiff's Second Set of Interrogatories. This answer is *prima facie* evidence that the rate for Narrows Dam is unlawful under 16 U.S.C. § 825s, which, by its terms, allows only recovery of power costs." (Footnote omitted.)

In view of the number of times that Petitioners objected specifically to the inclusion of fish and wildlife and recreation costs in the Narrows Dam rate, Respondents' statement that the objection was not made is incomprehensible.

II. RE SUBMISSIONS AT THE AGENCY LEVEL

At pages 20-21 and 25-28 of their petition for certiorari, Petitioners set forth certain parts of the legislative history of the Administrative Procedure Act ("APA"). Petitioners believe this history shows unequivocally that Congress, when it enacted §§ 553(c) and 706(2)(F) of the APA, intended that, in rulemaking cases where the statute does not require a trial-type hearing (*i.e.*, in cases of informal rulemaking), disputed facts relevant to the validity of the rule would be tried in the district court. At page 13 of their brief in opposition, Respondents make the following statement:

"But the history to which petitioners refer (Pet. 20-21) concerns the situation where no agency hearing precedes the promulgation of a challenged rule. Here, however, the agency conducted an informal rulemaking investigation and received evidentiary submissions from petitioners as well as the Corps of Engineers. This hearing procedure is ample for informal rulemaking."

It is not clear whether Respondents have simply confused their usage of the term "hearing,"¹ or whether,

¹ The above-quoted passage from Respondents' brief uses the term "hearing" twice. The passage makes sense only if both uses of the term "hearing" refer to the same kind of procedure, *i.e.*, either trial-type procedure or notice and comment procedure. However, the first sentence of the passage is correct only if "hearing"

by reference to so-called "evidentiary submissions," they mean to imply that the procedures afforded Petitioners were in excess of those normally associated with informal rulemaking.

What is clear is that, contrary to Respondents' statement, the agency received no submissions—evidentiary or otherwise—from the Corps of Engineers. In the case of Sam Rayburn Dam, the agency twice requested comments from the Corps,² but the order approving the rate increase stated:

"No comments or suggestions concerning SWPA's rate increase request were received by the Commission from the Corps of Engineers." (J.A. 949.)

Furthermore, the only submissions the agency received from Petitioners were comments questioning various aspects of the proposed rate increases. The

there refers to trial-type procedure (see excerpts from Senate and House Reports, Pet. 20-21, 25-28); and the reference to "hearing" in the last sentence presumably refers to notice and comment procedure, since informal rulemaking by definition does not involve trial-type procedures.

² On June 12, 1970, the Federal Power Commission's Bureau of Power wrote the Corps of Engineers asking for an explanation of the discrepancy between the Corps' costs shown in the Southwestern Power Administration's rate increase proposal and the Corps' costs shown in the Form No. 1 filed with the Commission by the Corps. J.A. 1059. On July 31, 1970, the Bureau of Power wrote the Corps again, asking for its response to the comments on the proposed rate increase filed by Petitioner Sam Rayburn Dam Electric Cooperative, Inc. J.A. 1008. Neither letter was answered by the Corps. J.A. 949.

agency approved the rate increases without responding to these comments.³

III. RE FORMAL FINDINGS OF FACT

Petitioners would also take this opportunity to point out a misstatement of their argument which appears in Respondents' brief at pages 10-11. There, Respondents state:

"Petitioners' contention (Pet. 18 [sic]) that formal findings should nonetheless be required in this case is not supported by *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), on which they rely."

Contrary to this statement, what Petitioners contend—and what they cite *Overton Park* in support of—is that:

"The requirement that agency orders and rules evaluate relevant standards is not limited to cases where the enabling legislation requires formal findings of fact. See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 408-09, 419-20 (1971)." (Pet. 17.)

Thus, Petitioners do not contend that formal findings should be required in this case; they contend that

³ Petitioners' comments are set forth at J.A. 170-72, 1002-07, 1020-26. The orders approving the rates without responding to the comments appear at J.A. 878, 945.

an evaluation of relevant standards should be required even though formal findings of fact are unnecessary.

Respectfully submitted,

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December 27, 1978

Certificate of Service

I hereby certify that on the 27th day of December 1978, I caused to be mailed a copy of the foregoing Reply Brief to each of the following individuals at the Department of Justice, Washington, D.C. 20530: (1) the Solicitor General of the United States; (2) Barbara Allen Babcock, Assistant Attorney General; (3) Leonard Schaitman, Attorney; and (4) Bruce G. Forrest, Attorney.

/s/ ROBERT F. PIETROWSKI, JR.
Robert F. Pietrowski, Jr.

Attorney for Petitioners

SOUTHWESTERN POWER ADMINISTRATION
 AVERAGE RATE AND REPAYMENT STUDY
 SAM RAYBURN DAM PROJECT

APPENDIX F

 DECEMBER 1970
 SUMMARY TABLE

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)	(15)	(16)	(17)	(18)	(19)	(20)
Year of Study	Fiscal Year	Gross Revenue	Corps O and M Expenses	SPA Purchased Power	Operating Expenses	All Other	SPA Total	Corps and SPA Interest	Allocated For Depreciation and Repayment	Net Rev. From Operations	Downstream Benefits	Amount Avail. For Principal/Int.	Corps and SPA Interest	POWER Principal	INVESTMENT Beginning of Year	Accumulated Annual Investment	Allowable Unpaid Balance	Fiscal Year	
A	1966	106,973	0	0	4,506	48,162	-159,641	0	-106,973	4,506	-111,479	22,639,862	22,751,341	22,639,862	1966				
C	1967	481,035	122,296	31,166	31,166	574,208	76,878	-323,513	327,573	574,208	-246,635	22,751,341	1,751,878	24,749,854	24,391,740	1967			
T	1968	558,334	141,199	69,215	69,215	614,146	81,814	-348,040	347,920	614,146	-266,226	24,749,854	14,484	25,030,564	24,406,224	1968			
1	U	950,004	153,368	66,156	66,156	616,623	84,571	29,286	730,480	616,623	113,857	25,030,564	34,865	24,951,572	24,441,089	1969			
2	A	950,004	165,038	68,199	68,199	614,786	86,704	15,277	716,767	614,786	101,981	24,951,572	8,410	24,858,001	24,449,499	1970			
L																			
	SUB-TOTAL	2,939,377	688,874		234,736	234,736	2,424,269	378,129	-786,631		2,015,767	2,424,269	-408,502		24,449,499				
3	1971	950,000	149,800		64,606	64,606	583,502	200,969	-48,877	735,594	583,502	152,092	24,858,001	-1,601,500	23,104,409	22,848,000	1971		
4	1972	1,030,000			58,988	58,988	557,593	205,993	57,626	821,212	557,593	263,619	23,104,409	0	22,840,790		1972		
5	1973				53,768	53,768	550,876	211,143	64,413	826,432	550,876	275,556	22,840,790		22,565,234		1973		
6	1974				51,518	51,518	543,932	216,422	68,328	828,682	543,932	284,750	22,565,234		22,280,484		1974		
7	1975				51,407	51,407	536,810	221,832	70,151	828,793	536,810	291,983	22,280,484		21,988,501		1975		
8	1976				49,664	49,664	529,469	227,378	73,689	830,536	529,469	301,067	21,988,501		21,687,434		1976		
9	1977				49,569	49,569	521,939	233,062	75,630	830,631	521,939	308,692	21,687,434		21,378,742		1977		
10	1978				46,134	46,134	514,139	238,889	81,038	834,066	514,139	319,927	21,378,742		21,058,815		1978		
11	1979				46,050	46,050	506,138	244,861	83,151	834,150	506,138	328,012	21,058,815		20,730,803		1979		
12	1980				45,980	45,980	497,936	250,983	85,301	834,220	497,936	336,284	20,730,803		20,394,519		1980		
13	1981						489,529	257,257	87,434			489,529	344,691	20,394,519		20,049,828		1981	
14	1982						481,314	263,689	89,217			481,314	352,906	20,049,828	16,500	19,713,422	22,864,500	1982	
15	1983						472,502	270,281	91,437			472,502	361,718	19,713,422	0	19,351,704		1983	
16	1984						463,459	277,038	93,723			463,459	370,761	19,351,704		18,980,943		1984	
17	1985				45,894	45,894	454,188	283,964	96,154		834,306	454,188	380,118	18,980,943		18,600,925		1985	
18	1986						444,685	291,063	98,558			444,685	389,621	18,600,825		18,211,204		1986	
19	1987						435,529	298,340	100,437			435,529	398,777	18,211,204	24,000	17,836,427	22,888,500	1987	
20	1988						425,575	305,798	102,933			425,575	408,731	17,836,427	0	17,427,696		1988	
21	1989						415,356	313,443	105,507			415,356	418,950	17,427,696		17,008,746		1989	
22	1990						404,883	321,279	108,144			404,883	429,423	17,008,746		16,579,323		1990	
23	1991						394,147	329,311	110,848			394,147	440,159	16,579,323		16,139,164		1991	
24	1992						383,891	337,544	112,871			383,891	450,415	16,139,164	30,700	15,719,449	22,919,200	1992	
25	1993						372,650	345,983	115,673			372,650	461,656	15,719,449	0	15,257,793		1993	
26	1994						361,109	354,632	118,565			361,109	473,197	15,257,793		14,784,596		1994	
27	1995						349,279	363,498	121,529			349,279	485,027	14,784,596		14,299,569	22,848,000	1995	
28	1996						337,153	372,585	124,568			337,153	497,153	14,299,569		13,802,416		1996	
29	1997						325,126	381,900	127,280			325,126	509,180	13,802,416	16,500	13,309,736	22,935,700	1997	
30	1998						312,407	391,447	130,452			312,407	521,899	13,309,736	0	12,787,837		1998	
31	1999						299,360	401,234	133,712			299,360	534,946	12,787,837		12,252,891		1999	
32	2000						285,986	411,264	137,056			285,986	548,320	12,252,891		11,704,571		2000	
33	2001						272,278	421,546	140,482			272,278	562,028	11,704,571		11,142,543		2001	
34	2002						268,017	432,085	134,204			268,017	566,289	11,142,543	401,600	10,977,854	23,337,300	2002	
35	2003			</td															

**SOUTHWESTERN POWER ADMINISTRATION
AVERAGE RATE AND REPAYMENT STUDY
NARROWS DAM PROJECT**

APPENDIX G

**DECEMBER 1970
SUMMARY TABLE**

(1) Year of Study	(2) Fiscal Year	(3) Gross Revenue \$	(4) Corps O and M Expenses \$	(5) Purchased Power \$	(6) Service Charges \$	(7) All Other \$	(8) SPA Total \$	(9) Corps and SPA Interest \$	(10) Allocated For Depreciation and Repayment \$	(11) Net Rev. From Operations \$	(12) Downstream Benefits \$	(13) Amount Avail. For Principal/Int. \$	(14) Corps and SPA Interest \$	(15) Principal \$	(16) POWER Beginning of Year \$	(17) Added During Year \$	(18) INVESTMENT Balance To Be Repaid \$	(19) Accumulated Annual Investment \$	(20) Allowable Unpaid Balance \$	Fiscal Year
	1950	3,823						-48		3,871	0	3,823	-48	3,871		5,496,130	5,492,259	5,496,130		1950
1	1951	166,266	122,751			10,283	10,283	136,891	90,370	-194,029		33,232	136,891	-103,659	5,492,259	5,595,918			1951	
2	1952	233,382	128,467	34,366	4,872	36,817	76,055	139,537	90,370	-201,047		28,860	139,537	-110,677	5,595,918	5,706,595			1952	
3	1953	310,364	115,524	106,096	12,000	48,394	166,490	142,311	88,532	-202,493		28,350	142,311	-113,961	5,706,595	5,820,556			1953	
4	1954	321,535	109,616	117,564	12,000	13,317	142,881	144,651	89,624	-165,237		69,038	144,651	-75,613	5,820,556	5,896,169			1954	
	5 A	331,621	114,409	128,586	12,000	19,751	160,337	146,693	89,766	-179,584		56,875	146,693	-89,818	5,896,169	5,985,987			1955	
	6	331,439	92,648	129,819	12,000	4,868	146,687	148,498	91,704	-148,098		92,104	148,498	-56,394	5,985,987	6,042,381			1956	
	7 C	333,219	91,393	129,095	12,000	8,648	149,743	149,909	91,691	-149,517		92,083	149,909	-57,826	6,042,381	6,100,207			1957	
	8	358,328	104,494	125,866	12,000	9,302	147,168	151,172	91,354	-135,860		106,666	151,172	-44,506	6,100,207	6,144,713			1958	
	9 T	364,451	126,673	128,686	12,000	5,963	146,649	152,479	90,369	-151,719		91,129	152,479	-61,350	6,144,713	6,206,063			1959	
	10 U	363,584	112,024	127,856	12,000	6,101	145,957	153,832	90,369	-138,598		105,603	153,832	-48,229	6,206,063	6,254,292			1960	
	11	365,692	141,078	42,132	3,367	45,695	91,194	154,689	90,369	-111,638		133,420	154,689	-21,269	6,254,292	6,275,561			1961	
	12 A	331,731	126,444	32,000	4,532	17,414	53,946	154,997	90,369	-94,025		151,341	154,997	-3,656	6,275,561	6,279,217			1962	
	13	309,040	127,869	0	0	18,516	18,516	154,820	90,894	-83,059		162,655	154,820	7,835	6,279,217	-1,030	6,270,352	5,495,100		1963
	14 L	300,000	134,156			16,464	16,464	154,681	89,393	-94,694		149,380	154,681	-5,301	6,270,352	6,275,653			1964	
	15 S	300,112	134,043			14,560	14,560	154,204	81,362	-84,057		151,509	154,204	-2,695	6,275,653	6,278,348			1965	
	16	300,000	135,659			10,987	10,987	154,367	-504,503	503,490		153,354	154,367	-1,013	6,278,348	6,279,361			1966	
	17	300,000	129,208			19,705	19,705	155,232	-389,486	385,341		151,087	155,232	-4,145	6,279,361	6,283,506			1967	
	18	300,000	133,855			16,163	16,163	155,250	33,045	-38,313		149,982	155,250	-5,268	6,283,506	6,288,774			1968	
	19	300,000	155,835			14,461	14,461	155,622	33,871	-59,789		129,704	155,622	-25,918	6,288,774	6,314,692			1969	
	20	1970	345,328	164,978		16,790	16,790	190,141	40,577	-67,158		163,560	190,141	-26,581	6,314,692	1,666,926	8,008,199	7,162,026		1970
	SUB-TOTAL		6,269,915	2,501,124	1,102,066	108,771	354,199	1,565,036	3,049,928	560,040	-1,406,213		2,203,755	3,049,928	-846,173		7,162,026			
	21	1971	368,000	151,000		19,132	19,132	198,803	86,871	-87,806		197,868	198,803	-935	8,008,200	238,000	8,247,135	7,400,000		1971
	22	1972	465,000			20,924	20,924	199,927	89,043	4,106		293,076	199,927	93,149	8,247,135	0	8,153,986			1972
	23	1973				19,105	19,105	197,204	91,269	6,422		294,895	197,204	97,691	8,153,986		8,056,295			1973
	24	1974				17,414	17,414	194,355	93,551	8,680		296,586	194,355	102,231	8,056,295		7,954,064			1974
	25	1975				16,685	16,685	191,924	95,889	9,502		297,315	191,924	105,391	7,954,064	13,100	7,861,773	7,413,100		1975
	26	1976				16,649	16,649	189,296	98,287	9,768		297,351	189,296	108,055	7,861,773	0	7,753,718			1976
	27	1977				16,085	16,085	186,581	100,744	10,590		297,915	186,581	111,334	7,753,718		7,642,384			1977
	28	1978				16,055	16,055	183,798	103,262	10,885		297,945	183,798	114,147	7,642,384		7,528,237			1978
	29	1979				14,941	14,941	180,916	105,844	12,299		299,059	180,916	118,143	7,528,237		7,410,094			1979
	30	1980				14,915	14,915	178,179	108,490	12,416		299,085	178,179	120,906	7,410,094	8,900	7,298,088	7,422,000		1980
	31	1981				14,892	14,892	175,161	111,202	12,745		299,108	175,161	123,947	7,298,088	0	7,174,141			1981
	32	1982						172,063	113,9											